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[DOI:10.5281/zenodo.10576927](https://doi.org/10.5281/zenodo.10576927)

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Recommended Citation

Stock, C. (2022). A Fifth core crime: Crime of ecocide as a new puzzle of the international criminal law. *Yearbook of International & European Criminal and Procedural Law*, vol.1, n.1, 248-284, Article 4

Available at: <https://yiecpl.free.nf/index.php/yiecpl/issue/current>

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**A FIFTH CORE CRIME: CRIME OF ECOCIDE AS A
NEW PUZZLE OF THE INTERNATIONAL
CRIMINAL LAW**

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Abstract: The protection of the environment and above all the climate and energy crisis that destroys human life is a topic of debate at an international level for the protection of ecocide. However, so far we do not have a concrete and perfect notion, given that the term ecocide was born from biological science and not from jurists. International criminal law and especially the International Criminal Court (ICC) once again takes on the leading role. A new article is needed to introduce ecocide to the other crimes already punished by the Court. The time is right and now ripe and the international necessity demands, with the help of international criminal law, to further evolve this branch of international law, to protect peoples, to punish those who destroy the environment both in the period of peace and war and above all the large companies and multinationals that are protagonists of this crime. The case is clear enough, the conduct is broad in our day but it certainly includes the *mens rea* a ignorance to be punished as a crime. Of course we also speak of restorative or restorative international justice for this crime

because we have an ethical need and demand towards future generations to take clear positions for the protection and human life.

Key words: ecocide, core crime, ICC, international criminal law, corporate multinational, liability, protection of human rights, reparation, restorative justice, future generations.

Introduction

The climate change at an international and European level (Liakopoulos, 2011) looks like a crisis that reaches its peak with the war in Ukraine. It is part of the topics of debate of scholars of various subjects in our times. The ecological or climate change crisis (Kemp, 2013) has a not indifferent history that began for years and studied by various disciplines. What interests our research is to speak in international criminal law for a new crime as an autonomous crime, i.e. of ecocide. As a crime that destroys peoples and is oriented towards the crime of crimes (Schabas, 2003; Maison, 2017; Ambos, 2021; Duff, Hörnle, 2022) and without exaggerating even a new type with characteristics that resemble those of genocide (Higgins, Short, 2013; Liakopoulos, 2018; Davoise, 2020; Odello, Enbiński, 2020)¹.

¹According to Higgins and Short: “(...) ecocide is a crime of consequence, not of specific intent. Often ecocides result from industrial accidents, without a specific

The regulatory core (Higgins, 2010; Martin, 2012; Mehta, Meilz, 2015; Neyret, 2015; Lay et al., 2015; Mwanza, 2018; Mistura, 2018; Pereira, 2020) includes unlawful conduct that corresponds to a crime that falls within the scope of the protection of the damaged and impoverished global environment. And some States are already punished under current legislation that enters the field of environmental protection (Mègret, 2013; Kim, Bosselmann, 2015). The preamble to a new protection that includes ecocide as an international crime (Bustami, 2021)² has as its basis the identification of the conducts that include this crime of a criminal nature as well as its gravity for this type of crime (Zierler, 2011)³.

intent. The gravity of the harm justifies conviction without criminal intent. Historically, courts have found that corporations cannot have a criminal intent and could not be convicted of offenses that require a mental element (...) strict liability would also ensure that corporations can be held responsible (...) strict liability places the onus on the individual to prevent the harm, rather than on the issue of blame (...).

²UCLA Promise Institute for Human Rights Group of Experts, Proposed Definition of Ecocide (2021), available at <https://ecocidelaw.com/wp-content/uploads/2022/02/Proposed-Definition-of-Ecocide-Promise-Group-April-9-2021-final.pdf>; ““Ecocide” means any of the following acts or omissions committed in times of peace or conflict which cause or may be expected to cause widespread or long-term and severe damage to the environment”.

³According to Zierler: “(...) after the end of World War II, and as a result of the Nuremberg trials, we justly condemned the willful destruction of an entire people and its culture, calling this crime against humanity genocide. It seems to me that the willful and permanent destruction of environment in which a people can live in a manner of their own choosing ought similarly to be considered as a crime against humanity, to be designated by the term ecocide (...) the United States stands alone as possibly having committed ecocide against another country, Vietnam, through its massive use of chemical defoliants and herbicides. The United Nations would appear to be an appropriate body for the formulation of a proposal against ecocide (...). According to the above author the ecocide has a birth from 1970 with the help of biologist analysis.

The birth of the ecocide makes its presence in relation to the environmental damage caused during the Vietnam war (Fletcher, 2008; Zierler, 2011). In recent years, there has been institutional commitment from the EU⁴ and from various movements of non-governmental organizations that show a certain sensitivity to environmental protection (Gilbert, 2014; Greene, 2019)⁵.

Furthermore, it is noted that within the scope of the International Criminal Court (ICC) according to art. 8 (2) (b) (iv) of the Statute punishes:

“(...) an attack with the knowledge that it will cause (...) extensive, lasting and serious damage to the natural environment manifestly disproportionate to the concrete and direct military benefits foreseen” (Heller, Lawrence, 2007; Safferling, 2012; DeGuzman, 2012; Heller, 2013; Cryer at al., 2014; Rose, 2014; Hahd Al-Kasasibah, 2015; Grabert, 2015; Cottier, Grignon, 2016; Brady, 2018; Bellivier, Eudes, Lagodny, 2018; Collard, 2018; Bartels, 2020, Ambos, 2022).

As also the prohibition of environmental degradation in international humanitarian law, as found in articles 35(3) and 55(1) of the Additional Protocol I (AP I) (Droege, Tougas,

⁴<https://www.stopecocide.earth/new-breaking-news-summary/european-parliament-reaffirms-support-for-ecocide-law> see also the Draft European Green Resolution, On an international recognition of the crime of ecocide: For a binding international environmental law architecture, 5th European Green Cong (2 April 2017).

⁵See also the: Global Climate Litigation Report, UNEP 2020: <https://www.unep.org/resources/report/global-climate-litigation-report-2020-status-review>. See also <https://www.stopecocide.earth/making-ecocide-a-crime> the Expert Panel drew up the following definition of the crime of ecocide: which is affirmed that: “(...) unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts (...)”.

2013; Carson, 2013)⁶, forms the basis for this crime (Fleck, 2013).

It should be mentioned that the protection of the environment requires an armed conflict⁷ as a prerequisite and other requirements provided for by art. 8 (2) (b) (iv) (Heller, Lawrence, 2007) within the scope of the *ratione personae* that the ICC is competent. There is no notion, an autonomously envisaged article that enters the scope of the statute of the ICC. Only recently has been mentioned in the Policy Paper of the Office of the Prosecutor of 15 September 2016 the priority that is shown to the environment as an area that must enter the activity of the ICC (Smith, 2013; Patelo, 2016; Durney, 2018; Mwanza, 2018; Greene, 2021; Heller, 2021; Karnavas, 2021; Kersting, 2021; Burke, Celermajer, 2021)⁸.

⁶Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 55(1), 1125 UNTS 3. According to Carson: “(...) is referring to the companion provisions in AP I, the argument is however also valid regarding the crimes set out in article 8 (...)”.

⁷See also in argument: Protection of the environment in relation to armed conflicts, Text and titles of the draft principles provisionally adopted by the Drafting Committee on first reading, UN Doc A/CN.4/L.937, 6 June 2019.

⁸Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, 15.9.2016, par. 7, p. 40 and 41, “(...) give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land (...)”. According to Patel: “(...) mental Liability in the International Criminal Court was adopted in 1998.19 Article 8(2)(b)(iv) is the only instance where the Rome Statute addresses environmental wrongdoings. 20 An environmental war crime under Article 8(2)(b)(iv) could be prosecuted if the crime satisfies three elements (...) 21 First, the actus reus must be widespread, severe and cause long-term environmental damage. 22. Second, the actus reus cannot have been committed as part of a concrete or direct military advantage (...) the mens rea of act must be intentional (...)”.

The Assembly of States Parties (Guilfoyle, 2019)⁹ also considered the preliminary investigations into crimes against humanity. In practice, however, there are no concrete changes and commitments underway, but now the time to protect the environment at an international level and in collaboration with human rights has come (Scalia, 2015; Kotiuk, Weiss, Taddei, 2022)¹⁰, that is to say that an ad hoc article must be decided on the crime of ecocide worldwide.

The insufficiency of existing tools, and the non-concrete challenges based on political and non-legal criteria demonstrate the need for the introduction of ecocide as a new international crime (Delmas-Marty, 2010)¹¹. Unfortunately, the concrete commitment of an institution, international organization, etc. is

⁹Government of the Republic of Vanuatu, Statement by The Honourable Minister of Justice and Community Services, Ronald K Warsal (MP) at the 15th Session of the Assembly of States Parties to the Rome Statute, 17.11.2016, in: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/GenDeba/ICC-ASP15-GenDeba-Vanuatu-ENG.pdf, available in the The Economist, “What’s in a name? Is it time for ecocide to become an international crime?”, 28 February 2021. United Nations Environmental Programme (“UNEP”), “How new laws could help combat the planetary crisis of 24 June 2021”, available online at: www.unep.org/news-and-stories/story/how-new-laws-could-help-combat-planetary-crisis. See also in argument: Assembly of States Parties, Rep. on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression, November 27, 2017, ICC-ASP/16/24. Assembly of States Parties, Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, available online at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf;

¹⁰As also we can take in consideration the jurisprudence of the European Court of Human Rights in case: Jugheli and others v. Georgia of 13 July 2017. According to Scalia: “(...) surveying cases on failures to set appropriate regulatory measures, failures to conduct impact assessment, and failures to strike a fair balance (...)”.

¹¹“(...) élargir le champ pénal au nom de notre appartenance à la communauté mondiale (...)”.

lacking as well as the rationale for it to be produced (Delmas-Marty, 2013). To codify ecocide as an international crime in an autonomous way allows thus to put an order to the system with a universal vocation that is quite susceptible at a national or international level.

The destruction of the environment is now a globally known reality. A very complex subject especially from the point of view of the criminalization of this crime. But is such a path possible and feasible?

From Nuremberg to the ICC. Ecocide and restorative criminal justice

A committee of experts set out to formulate a definition of the crime of ecocoding (Jessberger, Werle, 2020). The Nuremberg legacy is without words an important moment in the codification history of the international criminal law. The problem remains the identification of elements of continuity with the international criminal law in force (Jessberger, Werle, 2020). The spirit of Nuremberg is our continuity of international criminal law, the harbinger of the protection and respect of international crimes within a machine that needs not only to introduce and protect new crimes internationally but also to have a retributive and/or restorative character (Killean, Dempster, 2022).

Nuremberg has established a *logos* and *topos* of the new level of

the international order based both on respect for human rights and on the universality of humanistic values. But it is still a process shared by cultural scholars of international criminal protection. There is a need for overcoming from the nation state to the state of peoples, the protection of new/ future generations (Jodoin, Saito, 2012; Gaillard, 2012). The sensitive crystallization of political dynamics sees the super-institutions as an international court, i.e. a *super partes* organ of faith that protect and punish the crimes included in its adopted statute.

Ecocide cannot be seen as a classic crime that falls within the scope of all the others. It is a complex crime that should include a circle of notions that protect the environment globally by intervening at a level that must impose the conscience of future generations as well as the assumption of an international duty as a macrosymbol¹² towards the punishment of “community of destiny” (Marty, 2011).

The primary function of this incrimination must have the aim not only to sanctioning criminal behavior and the incriminating conscience between human beings and nature but also to declaring the state of urgency of the climate crisis. The phenomena are many and for a long time it is enough just to see, understand and finally decide.

Ecocide cannot be limited as a crime to sanctioning a single

¹²Symbolic and to a certain extent evaluable and protectable according to the terms of need and the principles of proportionality and adequacy.

criminal conduct but a multitude of various conducts united as the main element of the criminal context.

The criminalization of international crimes is established with a different standardization methodology than the common crimes. Of course the result will be the same or the requirements of the crime may resemble the national ones but the criminal conduct needs a common element. We have seen crimes against humanity that must prove individual criminal behaviors such as torture, etc. Crimes committed in the context of a systematic attack on the civilian population as we see today in Ukraine, Syria and so on. War crimes are found in connection with an armed conflict. In this case the context element needs a selective function in a double sense since it allows the distinction between international crimes from common crimes and the differentiation of the various hypotheses of international crime. Thus, we can say that ecocide can be included in existing crimes without a new crime. On the other hand, we can consider these elements as auxiliaries to better define the crime of ecocide as well as the nuances that can be included (Neyret (dir.), 2015).

Ecocide due to its type of crime must have a symbolic-expressive function that also includes a sanctioning system as well as the development of enforcement mechanisms at national and international level. It is inspired by the globalized crime as destructive whose main actors are economic agents and as

victims the community of people who are not always and easily identified at international level¹³.

The doctrine to reinvigorate the autonomous character of crime has spoken to us for the establishment of an International Criminal Court for the Environment (Drumbl, 2001; Lehmen, 2015) but also to extend the pre-existing competence of the ICC (Higgins, Short, South, 2013; Greene, 2021) which will pick up the Nuremberg legacy arriving at a purely sanctioning and remuneration system at national and/or international level. The specificity of the ecocide crime involves macroscopic trends of cases already evident in the national legislation and jurisprudence. Just look and wait for the forms of restorative and criminal justice such as:

“(...) the monuments in our squares dedicated to the fallen will give way to monuments dedicated to future generations (...)” (Marty, 2013)¹⁴.

The construction of the memory of Nuremberg as the construction of a shared future for future generations becomes the new community of commitment to avoid illogical

¹³See the case: *Lalit Miglani vs State of Uttarakhand and others*, 139/17, pp. 64ss, “(...) which recognizes to natural entities in the State of Uttarakhand legal subjectivity and rights equivalent to those of living beings (...) the New Zealand law *The Awarua Tupua (Whanganui River Claims Settlement) Act 2017*, Public Act 2017 No. 7 in which it is legislated in favor of the requests of the Maori indigenous group towards the Whanganui River and its ecosystem, assigning legal personality to the river system (...)”.

¹⁴According to Marty: “(...) ne sait si les monuments aux morts seront un jour remplacés par des monuments aux générations futures, mais on observe déjà que la représentation traditionnelle du droit, identifié à l'État et conjugué au présent, ne rend pas compte de la mondialisation actuelle caractérisée non seulement par l'extension du champ juridique dans l'espace mais aussi par une dilatation des effets dans le temps (...)”.

phenomena that reach total anarchy where the forms of restorative justice are not only distant but with few gaps in the reconstruction of a comprehensive criminal protection (Tomuschat, 2002; Vormbaum, Werle, 2018; Varona, 2019; Nurse, 2020; Varona Martinez, 2021; Pali, Fortsyth, Tepper, 2022)

Restorative justice has reconciliation and ascertaining the truth as its final goal. Nuremberg, *ad hoc* courts, ICC, past, present and future of international criminal institutions are linked (Sarkin, 2016). The temporality and type of victims of the crime of ecocide highlight the limitations of remuneration mechanisms (Safferrling, 2021), i.e. general limits of international criminal law (Robinson, 2022)¹⁵. Redistributive international justice was created around the protection of the human person. Protection aimed at the need for truth and reconciliation and with a close dependence on the penalty-sanction and for nature protection in a certain sense. But doesn't nature also include man? The path of sanction towards the remunerative justice mechanism moves

¹⁵In particular in page 322 the author affirms that: "(...) criminal law is a coercive, expensive, and clumsy tool, with harmful side-effects. Criminal law should be the "last ratio"-the last resort in responding to a societal problem. This also has implications for the scope of the crime. For example, if one aims to elevate standards for best practices, then other avenues, including administrative law, are appropriate. Punishment should be reserved for the worst transgressions committed with significant fault (...) criminal law is not a suitable tool for complex societal reform. One cannot knit a blanket with a sledgehammer. A crime of ecocide need not and should not attempt to encompass and compel every necessary transformation of current modes of production and consumption. Many reforms must be addressed through negotiation, social change and other legal fields; ecocide can deal with an agreed core of prohibitions (...)".

towards the future towards the phenomena and modalities of restorative justice (Kolb, Scalia, 2012; Kolb, 2013; Khan, Dixon, Puulford, 2014; Kolb, 2014; Kolb, 2018). It is a model that needs interpretation from international criminal law, above all in the clarity between sanction and sanction system on a global level.

(Follows) Discontinuity

What are the problems of ecocide crime? Typing ecocide as a crime and the events that participate in the cases included in the protection of recipients, and the objective element allow a construction that shows many discontinuities with the cases included.

The genesis of the crime of ecocide is very different from the Nuremberg jurisprudential history and above all by the macro-historical facts since when we speak by ecocide we mean scientifically proven facts/data.

Time is not a major factor in the crime of ecocide. And we must also take into consideration the future, the catastrophe that will come for future generations since science describes itself as a starting point but without knowing the final result.

The phenomena that include global climate protection from the Nuremberg heritage are very different. They are slower but potentially deadly for the entire planet. Nobody forget and does

not remember the Rio de Janeiro Declaration on the environment and development as it declared and recognized: “(...) the integral and interdependent nature of the Earth, our home (...)” (Shelton, 1992)¹⁶. This is an affirmation that can be used by international criminal law where the protection of humanity as an important step initiated by Nuremberg is interdependent with the biosphere, the sphere of life that is capable of jeopardizing dignity and life of every human being the next few years (Klose, 2022). Humanity has surpassed the requirements of the Enlightenment of the past and is directed towards an independent road that can be built and verified daily to avoid a catastrophe announced as we have lived in the last few years in the former Yugoslavia and currently in Ukraine (Marty, 2021)¹⁷.

The goal is logical, correct and evolving but methodologically complex, because international criminal law is a tool that welcomes the perspective for its focus on the future and not on the lived past. This statement is based on humanistic protection as a common good for humanity, where crimes against humanity, war, genocide (Minkova, 2021), deportation, torture,

¹⁶UN, Report of the United Nations Conference on Environment and Development: Rio Declaration-Preamble, 12.8.1992.

¹⁷“(...) the ecological crisis-and the health crisis-reveal a new vision of Humanism, which the Author calls Humanism of Interdependencies. A Humanism, this, which refuses to place human beings in a position of domination, connecting them horizontally with other living beings (social solidarity) and with other non-living beings (ecological solidarity) (...)”, according to Marty.

etc. are codified to punish the evil done against the human being that harms and destroys the life of another human being on a global and collective level. Ecocide is an evil that travels indirectly from one human being to another human being. The rules of humanitarian law do not sufficiently protect populations during a war (Bothe, Bruch, Diamond, 2010). We need new things, new codification strategies worldwide and within the circle of the protection of international criminal law.

Ecocide is a crime that causes harm, an incriminating case that compromises the humanity. If in the past the threat was directed towards humans, in this case it is indirect and the consequences of evil include a vast topos ranging from the ecosphere, to acidification, to global warming, to nuclear weapons that destroy, etc. It is a discontinuity connected with previous attitudes and found in the good to be protected. Human rights, citizens' freedoms, the protection of humanity in line with the equality and dignity of the person without any distinction according to various texts of all kinds (binding or not) at international, European and national level put the protection of the home at stake common that is necessary for human life. The protection of the biosphere demands an awareness of interdependence between human beings and nature. If one is compromised, the lives of millions of people are also compromised. The problem is both juridical but also political,

anthropological, scientific from various other sciences.

The legal protection of an asset is a typical precondition and possibly cannot easily compose the individual punishable conduct.

Let us not forget that international criminal practice and jurisprudence up to the present day has shown that the main pillar of international justice remains the individual criminal responsibility (Liakopoulos, 2019)¹⁸. Responsibility for international crimes in a fairly revolutionary approach and far ahead of the Nuremberg system (Jessberger, Werle, 2008; Morales, 2020).

The criminalization of legal persons (Bush, 2009; Kaleck, Saage-Maaß, 2010; Jessberger, 2010; Van der Wilt, 2013; Kaeb, 2016) and/or multinationals has not been abandoned or considered. It is now a question of the evolution of international criminal law, after discussions that went back to the years of the establishment of the ICC (Clapham, 2000; Delmas Marty, 2013; Bellivier, Eudes, Fouchard, 2018).

In Nuremberg there was an attempt to judge power (Jessberger, Geneuss, 2010; Ambos, 2018), to punish the absurdity of some

¹⁸Art. 25(1) ICCSt., the ICC only has jurisdiction over “natural persons”, “(...) because there was not consensus on corporate criminal liability. The ICC still has jurisdiction over the human beings who operate corporations and who make criminal decisions therein. It can also be argued that dealing only with natural persons is not a flaw, but a feature; after all, the point of Nuremberg was that punishing individuals, and not just “abstract entities”, was a necessary part of changing behaviour (...)”, according to the Trial of the Major War Criminals before the International Military Tribunal: Proceedings November 14, 1945-October 1, 1946, Vol. I (1947), pp. 223.

maniacal brains that had power and destroyed human lives. But even in Nuremberg as well as in the arrival of ecocide, the need remains the same, that is, that national sovereignty and international protection cannot be destructive.

The crime of ecocide is based on the observation that there are no adequate tools of punishment for the real perpetrators, whether they are from large corporations that are hiding behind other anomalous brains that make money from permitted crimes (Seck, 2011; Olson, 2015; Kyriakakis, 2017)¹⁹; and/or world leaders, countries that harm the spheres of others in a covered way with very serious environmental violations, often arriving at both the complicity of States and state responsibility (Boon, 2011; Miretski, Bachmann, 2012; Liakopoulos, 2020). Therefore, we say that ecocide is a complex crime that is difficult to be analyzed and codified as an autonomous crime that cannot be foreseen as a form of responsibility for incriminating cases that have little effectiveness. Within this circle the question arises: on a structural level, which subjects can the case of ecocide include and how can it work? Is it aimed at a single industrialist, a large company, the head of State? The defendants cannot be called easily because the clues have been

¹⁹According to Seck: “(...) the Guiding Principles refer only to the inability of the host state to protect human rights in conflict contexts due to a lack of effective control, international criminal law teaches us that another factor often at play is an unwillingness on the part of host states to protect against international crimes due to the state’s own involvement in such crimes (...)”.

around for years and still remains the question of who will be called as the main perpetrator and what kind of sentence will be carried out? Can we speak of individual or collective responsibility? Who enters the circle of companies or the State involved in this type of crime?

Another last discontinuity according to our opinion is the discussion that has to do with the subjective element of the crime of ecocide. And why do we say this? Because international criminal law contemplates willful crimes, also for the nature of illicit acts, that is, crimes in conjunction with a necessary attempt. This is a behavior that goes beyond the simple notion of willful misconduct since it falls into the category of possible fraud. And the phenomena in question must admit the extension of the *dolus* towards a culpable charge (Findlay, Henham, 2016; Findlay, Chah Hui Yung, 2018;) as well as forms of strict liability (Jia, 2012; De Guzman, 2014; Aksenova, 2017; Heller, Mègret, Nouwen, Ohlin, Robinson, 2018) The crime of ecocide is not a simple crime of event, since it is accompanied by a further discontinuity which is that of the construction of the cases as event crimes. We must deal with the dangerous crimes presented in the international community, which are abstract because many times we do not know or know little about the causes and the phenomena that contrast with the events and populations that we would like to prevent.

The future of international criminal law through the crime of ecocide

The incriminating case of the crime of ecocide requires the stabilization of several elements that include this crime. The need for a crime related to the role, the functions that the international criminal instrument can have, remains a general question. A general indictment as a case is not sufficient for an international crime.

The challenges are still ongoing and very complex and not well deciphered. Continuity and discontinuity of a crime, whether of an individual or collective nature, are fundamental and questioning points that the path of codification must be international criminal law and on a national level economic criminal law.

The crime of ecocide is a crime that is placed in the international criminal law requiring a revolutionary evolution towards a specific integration in the criminal law sector, inaugurating a new sanctioning model aimed both at entities and at the strategies of reaction from offenses that look to the future.

The integration of models such as common and civil law are now obsolete in the international criminal justice system. The profitability that we noticed after Nuremberg with mere adjustment to the needs felt today could be the center of a

periphery of a circle that includes various cases.

The deepening of international criminal law with elements of continuity and discontinuity can help and better understand the legacy of Nuremberg as well as prevent the consequences and the rationale of the foundation of a new international crime that having to deal with ecocide as a new “son” of crime under international criminal law.

The set of existing systems but also of those outside the international criminal justice context include sanctions that ecocide requires. International criminal cooperation that goes hand in hand with the trend and the need for harmonization of the international legislator and of the various countries as an indispensable prerequisite for the efficiency of cooperative instruments is therefore assumed to be an instrumental objective of the various international conventions on the subject.

The commitment to tackle the climate and energy crisis with a precise method in accordance with the specialty of international criminal law is considered supplementary to legal power²⁰. The path of law is decided by the *voluntas legislatoris, rectius* from the Statutes of the international criminal courts (Delmas-Marty,

²⁰According for example to the French law presented on 10 February 2021, “(...) portant la lutte contre le dérèglement climatique et renforcement de la résilience face à ses effets (...)” which proposed the introduction of a délit (and not of a crime), while maintaining the name of ecocide. The choice was aimed at satisfying the demands of public opinion and expresses a choice of a symbolic-expressive nature without concern for effectiveness since it is classified as délit, intentional as it is also included in the environmental code and not in the criminal code.

2006; Delmas-Marty, 2010). We are referring to a process of homogenization of penal repression and of the phenomena that tend to manifest themselves more homogeneously in different areas of the planet. The territorial executive datum and an intrinsic homogeneity of the facts to justify a corresponding process of homogenization of the criminal response move towards a phenomenological homogeneity of the fact and also towards an evaluative homogeneity of the normative provision. There is also a serious tendency of particularity of the repressive needs of universal crimes as well as ecocide to a sort of “militarization” in our opinion of international criminal law which can manifest itself in various aspects and of different intensity. And why? Not all countries have gone so far and especially after Nuremberg and after the Lisbon Treaty from the European sphere to the same levels of repressive reinforcement in the internal/European sphere in this process of homogenization of international and European criminal law to the so-called post- modernity. There is no doubt that today's trends exist and that they go in a direction exactly opposite to the recognition of the fundamental rights of the individual and to the principle of humanity in international criminal law.

Let us not forget the classic contrast of the past in this regard between Grotius's thought and Beccaria's position. Even today he expresses with extreme clarity what are the tensions between

universalism and particularism, between international law and international criminal law, between international law and national law with regard to the hypothetical affirmation of a universal jurisdiction of states. We read in *De iure pacis ac belli* (Book II, chap. XX and XXI):

“(..) the general care of human society also falls to the sovereigns, regardless of the particular care of their states (...) the sovereigns and those who they have a power equal to that of kings, they have the right to inflict penalties not only for offenses committed against them or their subjects, but particularly those that seriously violate natural or peoples' rights with regard to anyone (...)”.

We read in crimes and penalties (part. XXI):

“(...) the judges are not the avengers of the human race in general, they are the defenders of particular conventions which bind a certain number of men together. A crime must only be punished in the country where it was committed, because men are forced to repair, by means of the example of punishment, the fatal effects that the example of the crime has produced (...)” (Cohen, 2020).

It is clear that there is no principle of customary law that imposes universal jurisdiction on States for certain crimes (Damjanovic, 2013; Blaise Ngameni, 2017; DeGuzman, 2020)²¹. Only a customary principle would be capable of overcoming the particularism of States. Political powers and the

²¹We mentioned also that in 1996, the ICTY Appeals Chamber (in case Tadić) finally admitted that: “(...) under customary international law, this requirement was no longer a “substantive element” of crimes against humanity, but only a “jurisdictional condition” imposed by the Security Council. See also art. 3 of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and art. 7 of the ICC Statute (...) have endorsed this interpretation, which is now largely accepted (...)”. ICTY in *Prosecutor v. Tadić*, Judgment, Case No. ICTY-94-1-A, 15 July 1999, parr. 185-229 as customary international law and has subsequently been applied in numerous cases, including ICTY, *Prosecutor v. Krajišnik*, Judgment, Case No. ICTY-00-39/40, 27 September 2006; Id, *Prosecutor v. Brđanin*, Judgment, Case No. ICTY- 99-36-A, 3 April 2007 and Id, *Prosecutor v. Popović et al.*, Judgment, Case No. ICTY-05-88-T, 10 June 2010.

evolution of international law will arrive at a substantially superior source, of natural law origin as it was in the Grotian perspective.

One of the imperatives of international criminal law at the universal level is to claim to be unconditional. This value can be qualified as a non-negotiable one. International criminal law is a value that can *hic et nunc* coincide with goods worthy of criminal protection by States. However, the challenge is not national law v. international law and/or politics v. justice, but protection of human rights v. protection of mankind.

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